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REPORT
104–171

CHILDREN'S PROTECTION FROM VIOLENT PROGRAMMING ACT OF 1995

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

together with

ADDITIONAL AND MINORITY VIEWS

ON

S. 470

NOVEMBER 9, 1995.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FOURTH CONGRESS

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CHILDREN'S PROTECTION FROM VIOLENT PROGRAMMING ACT OF 1995

NOVEMBER 9, 1995.—Ordered to be printed

Mr. PRESSLER, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 470]

The Committee on Commerce, Science, and Transportation to which was referred the bill to amend the Communications Act of 1934 to prohibit the distribution to the public of violent video programming during hours when children are reasonably likely to comprise a substantial portion of the audience, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of the bill is to protect all children, supervised and unsupervised, from the harm caused by viewing violence on television.

BACKGROUND AND NEEDS

I. SUMMARY

Each year, over 20,000 people are murdered in the U.S.—one person is killed every 22 minutes. While France has a murder rate of two homicides per 100,000 people; the U.S. has 9.4. The U.S. murder rate is four times the rate of Europe and 11 times higher than that of Japan. The U.S. homicide rate is rising 6 times faster than the population. Violence is the second leading cause of death

for Americans between the ages of 15 and 24, and is the leading cause of death for African-Americans of that age group.

The growth of violence in our society has prompted Congress to look for as many solutions as possible to reduce the extent of this problem. Congress first began to examine the link between television and violence with hearings in the 1950's. Concern arose again in the late 1960's and early 1970's after the wave of urban unrest caused some to question the effect of television on violent behavior. In 1972, the Surgeon General released a study demonstrating a correlation between television violence and violent behavior and called for Congressional action.

Each time the issue was raised in Congress, however, the industry continually promised to regulate itself while at the same time urging against Congressional action. In 1975, Richard Wiley, Chairman of the Federal Communications Commission (FCC), announced that he had reached an agreement with the broadcasters that made Congressional action unnecessary. This agreement provided that the television industry would voluntarily restrict the showing of violent shows during the "family hour."

During the 1980's, the amount of violence on television increased substantially. One study found up to 32 acts of violence on television on children's programming. The increase in violence coincides with an increase in the amount of time children spend watching television. Children spend, on average, 28 hours per week watching television, which is more time than they spend in school.

Between 200 and 3000 independent research studies have now been conducted that demonstrate a causal link between viewing violent programming and aggressive behavior. Several national organizations, including the National Institutes for Mental Health, the American Psychological Association, and the National Parent-Teacher Association, believe that legislation is necessary to help parents protect their children and to protect unsupervised children from the negative effects of television violence.

S. 470, the "Children's Protection from Violent Programming Act of 1995", adopts the same approach to television violence that the courts recently upheld for broadcast "indecency". S. 470 prohibits the distribution of violent video programming during hours when children are reasonably likely to comprise a substantial portion of the audience. The provisions apply to broadcast television, cable television (except for premium channels or pay-per-view programs), and other distribution media such as satellite television.

This "safe harbor" is necessary because other approaches may not be successful in protecting all children from the effects of violent television. Other measures, such as program blocking technologies, parental educational efforts, and warning labels, may be helpful to children whose parents take an active role in supervising the children's television viewing habits. Many children, however, are not supervised when watching television. The "safe harbor" approach is thus the least restrictive means that would actually accomplish the goal of protecting children from violent programming. The bill thus meets the "strict scrutiny" test set down by the Supreme Court for "content-based" regulation.

II. HISTORY OF CONGRESSIONAL CONCERN

Congress has expressed concern over the amount of violence on television for over forty years. Studies conducted in the 1950s showed that violent crime increased significantly early in that decade, and some researchers believed that the spread of television was partly to blame. In response, Congress held hearings concerning violence in radio and television and its impact on children and youth in 1952 and 1954. In 1956, one of the first studies of television violence reported that 4-year-olds who watched the "Woody Woodpecker" cartoon were more likely to display aggressive behavior than children who watched the "Little Red Hen." After the broadcast industry pledged to regulate itself, and after the FCC testified against censorship, no action was taken.

The urban riots of the 1960's again raised concern about the link between television violence and violent behavior. In response to public concern, President Lyndon B. Johnson established the National Commission on the Causes and Prevention of Violence. The Commission's Mass Media Task Force looked at the impact of violence contained in entertainment programs aired on television and concluded that (1) television violence does have a negative impact on behavior and (2) television violence encourages subsequent violent behavior and "fosters moral and social values about violence in daily life which are unacceptable in a civilized society." [1]

In 1969, Senator John Pastore, Chairman of the Senate Subcommittee on Communications of the Committee on Commerce, petitioned the Surgeon General to investigate the effects of TV violence. In 1972, Surgeon General Jessie Steinfeld released a study [2] demonstrating a correlation between television violence and violent behavior and called for Congressional action. The five-volume report concluded that there was a causal effect from TV violence, but primarily on children presupposed to be aggressive. The then-FCC Chairman, Dean Burch, declined to regulate violence, saying that the FCC should not "make fundamental programming judgments."

Several more hearings were held after the release of the Surgeon General's report in the 1970s. Despite studies showing an increase in violent programming, little regulatory or Congressional action was taken. Discussions continued regarding the relationship between violence in society and what was shown on television. The continued concerns prompted Congress to request the FCC to study possible solutions to the problems of television violence and sexually-oriented materials.

On February 20, 1975, under the direction of then-Chairman Wiley, the FCC issued its Report on the Broadcast of Violent and Obscene Material. The report recommended statutory clarification regarding the Commission's authority to prohibit certain broadcasts of obscene and indecent materials. However, with regard to the issue of television violence, the FCC did not recommend any

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[1] U.S. National Commission on the Causes and Prevention of Violence. To Establish Justice, To Insure Domestic Tranquility. Final Report of the National Commission on the Causes and Prevention of Violence. Washington, U.S. Govt. Print. Off., December 1969, p. 199.

[2] U.S. Dept. of Health, Education, and Welfare. The Surgeon General's Scientific Advisory Committee on Television and Social Behavior. Television and Growing Up: The Impact of Televised Violence. Report to the Surgeon General. U.S. Public Health Service. Washington, U.S. Govt. Print. Off., 1972, p. 279.

congressional action because the industry had recently adopted a voluntary "family viewing" period.[3] The Television Code, however, fell out of use in the 1980s.

Since the early 1960s, the Committee has held eighteen hearings on the subject of television violence.[4] Not a single piece of legislation was reported out of the Committee.

III. RESEARCH ON TV VIOLENCE

Research has consistently shown a link between viewing violence on television and violent behavior. Following the Surgeon General's 1972 report, significant research was conducted detailing the correlation between viewing violent television and later aggressive behavior. Several of the leading medical associations published similar conclusions, including the American Medical Association, the American Psychological Association, the American Pediatric Association, and the American Academy of Pediatrics.[5]

For instance, a study by Tanis Williams supports the conclusion that there is a direct correlation between television violence and aggressive behavior in children. Williams, a researcher at the University of British Columbia, studied the impact of television on a small rural community in Canada that received television signals for the first time in 1973. The researchers observed forty-five first and second graders for signs of inappropriate aggressive behavior. Two years later, the same group was observed and it was found that the aggressive behavior in the children increased by 160 percent as compared to a control group that saw no noticeable increase in aggressive behavior.[6]

In 1982, the National Institute of Mental Health (NIMH) produced a new report entitled Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties. In contrast to the Surgeon General's 1972 report, the NIMH concluded that TV violence affects all children, not just those predisposed to aggression. The 1982 report reaffirmed the conclusions of the earlier studies stating:

> After 10 more years of research, the consensus among most of the research community is that violence on television does lead to aggressive behavior by children and teenagers who watch the programs. This conclusion is based on laboratory experiments and on field studies. Not all children become aggressive, of course, but the correlations between violence and aggression are positive. In magnitude, television violence is as strongly correlated with aggressive behavior as any other behavioral variable that has been measured. The research question has moved

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[3] On February 4, 1975, the National Association of Broadcasters (NAB) Television Code Review Board adopted a code implementing a family viewing period between 7 to 9 p.m., viewer advisories, and warnings to publishers of the advisories.

[4] S. Hrng. 91–6 (March 12, 19, and 20, 1969); S. Hrng. 92–32 (September 28, 1971); S. Hrng. 92–52 (March 21, 22, 23, and 24, 1972); S. Hrng. 93–76 (April 3, 4, and 5, 1974); S. Hrng. 94–62 (February 13, 1976); S. Hrng. 95–60 (May 9, 10 and 11, 1977); S. Hrng. 101–221 (June 12, 1989); S. Hrng. 103–852 (October 20, 1993); and S. Hrng. 104— (July 11, 1995).

[5] Centerwall, Brandon S., Television and Violence: The Scale of the Problem and Where to Go From Here. JAMA, v. 267, no. 22, June 10, 1992, p. 3059.

[6] Centerwall, Brandon. Television and Violent Crime, Public Interest, No. 111, Spring 1993. p.56.

> from asking whether or not there is an effect to seeking explanations for the effect.[7]

Not all research, though, supported this conclusion. In 1982, NBC sponsored a study of the issue and reported there was no correlation. In addition, a 1984 analysis of all the available studies by Jonathan L. Freedman, of the Department of Psychology at the University of Toronto, concluded that the published studies did not support the hypothesis that viewing habits of children resulted in subsequent changes in behavior in children.[8]

More recent research adds credibility to the findings of the NIMH. Two of the most widely publicized empirical studies adopt two different methodologies, but arrive at the same result. In one of the studies, Dr. Leonard Eron followed a group of children in upstate New York State and examined them at ages 8, 19 and 30. The study found that the more the participants watched TV at age 8, the more serious were the crimes of which they were convicted by age 30, the more aggressive was their behavior when drinking, and the harsher was the punishment which they inflicted on their own children. Similar experiments were conducted in Australia, Finland, Israel, and Poland, and the outcome was the same in each experiment.

Another study was conducted by Dr. Brandon Centerwall, a Professor of Epidemiology at the University of Washington. He studied the homicide rates in South Africa, Canada and the United States in relation to the introduction of television. In all three countries, Dr. Centerwall found that the homicide rate doubled about 10 or 15 years after the introduction of television. According to Dr. Centerwall, the lag time in each country reflects the fact that television exerts its behavior-modifying effects primarily on children, whereas violent activity is primarily an adult activity. Dr. Centerwall concludes that "long-term childhood exposure to television is a causal factor behind approximately one-half of the homicides committed in the United States." This report[9] concerning the harmful impact of viewing television violence on preadolescent children found that extensive exposure to television violence could lead to chronic effects extending into later adolescence and adulthood.

These studies explore the link between violent television and violent behavior. However, violent behavior may not be the only harm caused by television violence. The American Psychological Association believes that the harm caused by violent television is broader and includes fearfulness and callousness:

> Viewing violence increases fear of becoming a victim of violence, with a resultant increase in self-protective behaviors and increased mistrust of others;
>
> Viewing violence increases desensitization to violence, resulting in calloused attitudes toward violence directed at others and a decreased likelihood to take action on behalf of the victim when violence occurs (behavioral apathy); and

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[7] The NIMH Report, p. 6.

[8] An analysis by the Congressional Research Service (CRS) questioned the conclusions of these studies. According to CRS, a re-analysis of the NBC study revealed a direct correlation between viewing violence and harmful behavioral changes in children. Television Violence: A Survey of Selected Social Science Research Linking Violent Program Viewing With Aggression in Children and Society, Report by Edith F. Cooper, Congressional Research Service, May 17, 1995, p. 1.

[9] Centerwall, p. 3059–3063.

Viewing violence increases viewers' appetites for becoming involved with violence or exposing themselves to violence.

IV. ANECDOTAL EVIDENCE OF THE EFFECT OF TV VIOLENCE

In addition to the research, there are several compelling examples of the effects of television on children. In May 1979, Johnny Carson used a professional stuntman to "hang" Carson on stage. After a "noose" was placed around Carson's neck, he was dropped through a trap door and emerged unharmed. The next day, a young boy, Nicholas DeFilippo, was found dead with a rope around his neck in front of a TV set tuned to NBC. The parents of the child sued NBC for negligence, but lost their suit. Twenty-six people died from self-inflicted gunshot wounds to the head after watching the Russian Roulette scene in the movie "The Deer Hunter" when it was shown on national TV.

V. THE GROWTH OF TV VIOLENCE

According to several studies, television violence increased during the 1980s both during prime-time and during children's television hours. Children between the ages of 2 and 11 watch television an average of 28 hours per week. According to a University of Pennsylvania study, in 1992 a record 32 violent acts per hour were recorded during children's shows. The American Psychological Association estimates that a typical child will watch 8,000 murders and 100,000 acts of violence before finishing elementary school.

A similar story exists for prime-time programming. The National Coalition on Television Violence (NCTV), a monitoring and advocacy group, found that 25 percent of the prime-time shows in the 1992 fall season contained "very violent" material.

In August 1994, the Center for Media and Public Affairs released the results of a new survey showing an increase in the amount of violence on a single day of television in Washington, D.C. As it did in 1992, the Center monitored 10 channels of programming (six broadcast channels and 4 cable programs) on a single day in April. The Center found a 41% increase in television violence over the findings of its 1992 study. The Center counted 2605 violent scenes in that day, an average of almost 15 scenes of violence per channel per hour. Life-threatening violence increased by 67% and incidents involving gun play rose 45%. The Center found that the greatest sources of violence on television came from "promos" for upcoming shows and movies, which were up 69% from 1992. Only toy commercials saw a reduction in violence; violence in toy commercials dropped 85%.

Sponsors of these studies believe that there are several reasons for this increased TV violence. One cause is the increase in "reality shows", such as Top Cops, Hard Copy, and A Current Affair. These shows describe or provide tape footage from actual police activity, including efforts to subdue suspects resisting arrest. Another reason is the increase in violence shown on the nightly news programs, which may in part result from the increase in violent acts in society. A very significant factor is the increase in cable programming that seeks smaller, niche audiences. According to one study, 3 of the top 4 most violent channels were cable channels, while the three major network affiliates and the public broadcast-

ing affiliate were at the bottom of the list—the 144 music videos on MTV included almost as much violence as the three network affiliates combined.

Some believe that the most violent programs are cartoons. The inclusion of fantasy or animated characters in the compilation of violent programming is controversial. Some observers believe that cartoon violence should be distinguished from "real-life" violence that may glamorize violence. Many child psychologists, however, believe that young children are especially vulnerable to violent programs because they are unable to distinguish between fantasy and reality.

An example of this problem involved MTV's cartoon, "Beavis and Butthead", which used to air every day at 7:00 p.m. The cartoon is a parody of two young teenagers and their view of daily life. The two characters engage in what some observers view as irresponsible activity, including cruelty to animals. In particular, the show occasionally has the two characters suggesting that setting objects on fire is "cool". It has been alleged that the cartoon's depiction of unsafe fireplay led one 5-year old in Ohio to set his family's mobile home on fire, causing the death of his 2-year-old sister in 1993. Although MTV denies any connection, it has removed all references to fire for future episodes, and has rescheduled the program to 10:00 p.m.

VI. RESPONSE BY THE TELEVISION COMMUNITY

Although the broadcast community now admits that there is some link between violent television and violent behavior, the broadcasters join with the other sectors of the industry in believing that these findings exaggerate the importance of television violence. They argue, for instance, that the Eron and Centerwall studies contain methodological problems because they fail to take into account other factors that may contribute to the violent behavior. They argue that income level, socioeconomic status, and especially the amount of supervision by parents have a greater impact on violent behavior than television. One study noted that an increase in violent behavior by children also was found after children watched Sesame Street, perhaps the most successful educational television show. They note that the homicide rate for white males in the U.S. and Canada stabilized 15 years after the introduction of television and did not increase in the 1980s despite the increase in the amount of television violence.

A. Public service announcements

Other efforts being undertaken include a series of public service announcements. For example, in November 1993, NBC launched a campaign called "The More You Know" focusing on teenage violence and conflict resolution.

B. Common television code

In an effort to address the increase of television violence during the 1980s, Congress passed legislation proposed by Senator Simon providing the television industry a three-year exemption from the antitrust laws to give it an opportunity to develop common standards to reduce violent programming. In December 1992, three net-

works (ABC, NBC, and CBS) adopted a common set of "Standards for the Depiction of Violence in Television Programs." Some observers have criticized these efforts because the standards adopted by the networks appear weaker than the networks' own standards.

C. Warning labels

In June 1993, the networks also decided voluntarily to place "warning" labels before any show which the networks believed to contain violent material. The three networks committed that, before and during the broadcasting of various series, movies, made-for-TV movies, mini-series and specials that might contain excessive violence, the following announcement would be made: "Due to some violent content, parental discretion is advised." The warning label has been tested for the past two years. The warning is also included in advertising and promotional material for certain programs and is offered to newspapers and magazines that print television viewing schedules.

A similar advisory program was adopted by the Independent Television Association (INTV—the trade group representing many of the 350 television stations not affiliated with one of the three networks). All the station members of INTV have adopted this voluntary code.

D. Industry monitors and studies

In January 1994, both broadcast network and cable television executives announced that they would hire independent monitors to assess the amount of violence on television. The cable television industry chose Mediascope, a non-profit California-based group, to monitor its programming for violent content and provide a report for the public that is expected in the spring of 1996. On June 29, 1994, the four broadcast networks (ABC, NBC, CBS, and Fox) selected the University of California at Los Angeles (UCLA) Communication Policy Center to analyze, assess, and report on television violence.

In February 1994, the National Cable Television Association (NCTA) adopted an industry policy called "Voices Against Violence." The cable industry agreed to reduce and eliminate the gratuitous use of violence, implement a parental advisory system, and develop, in cooperation with broadcasters, a violence ratings system that endorses viewer discretion technology.

VII. ACTIONS IN OTHER COUNTRIES

In 1994, the Canadian broadcasters, under pressure from the Canadian Government, instituted a new voluntary Code Against Violence for television that took effect this year. The code bans shows with gratuitous violence and limits those shows that include scenes of violence suitable for adults only to the hours after 9 p.m. The code places limits on children's shows by requiring that violence not be a central theme. Also, it stipulates that, in children's programs, violence not be shown as a preferred way of solving problems and that the consequences of violence be demonstrated. Similar measures have also been adopted by the United Kingdom, France, Belgium, New Zealand, Australia, and Colombia.

VIII. CONSTITUTIONAL ANALYSIS

Some have questioned whether limiting the distribution of violent programming to certain hours of the day would be consistent with the First Amendment of the Constitution. Attorney General Janet Reno responded to some of these questions when she testified in October 1993 that the safe harbor approach in S. 1383 (the predecessor to S. 470) and the other bills before the Committee at that time were constitutional.[10]

There are several exceptions to the First Amendment. According to a study by the Congressional Research Service (CRS),[11] the Supreme Court has allowed Government regulation of obscenity, child pornography, and speech that creates a "clear and present danger". In addition, CRS notes that the courts provide only limited First Amendment protection to commercial speech, to defamation, and to speech that can be harmful to children. CRS further notes that "even speech that enjoys the most extensive First Amendment protection may be restricted on the basis of its content if the restriction passes 'strict scrutiny'".[12] Finally, CRS notes that the courts will allow certain time, place and manner restrictions.

While no court has ruled specifically on the constitutionality of the approach taken by S. 470, there appear to be many lines of decisions that would support the constitutionality of the "safe harbor" approach to television violence. S. 470 could fall within the ambit of the clear and present danger exception, the limitations on commercial speech and speech harmful to children, the strict scrutiny test, and/or a regulation of time, place and manner. The following discussion focuses on the recent opinion concerning broadcast indecency and the "strict scrutiny" test as examples of the lines of analysis that appear to support the constitutionality of the "safe harbor" approach. This discussion is not exhaustive, and there may well be arguments to justify the legislation which do not appear below.

A. Broadcast indecency and the ACT IV case

A recent Court of Appeals decision upholding the "safe harbor" for broadcast indecency provides, perhaps, the best indication that the courts would uphold the "safe harbor" approach for television violence.

In 1992, Congress enacted legislation sponsored by Senator Robert Byrd to prohibit the broadcast of indecent programming during certain hours of the day. The Byrd amendment allowed indecent broadcasts between the hours of midnight and 6 a.m., except that public broadcast stations that go off the air at midnight or before

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[10] Testimony of Attorney General Janet Reno, Hearing on S. 1383, the Children's Protection from Violent Programming Act of 1993, et al., before the Senate Committee on Commerce, Science and Transportation, October 20, 1993, pp. 30, 42.

[11] "Freedom of Speech and Press: Exceptions to the First Amendment", Henry Cohen, American Law Division, Congressional Research Service, April 7, 1992, Revised July 6, 1993.

[12] "Strict scrutiny" requires the government to show that the restriction serves to promote a compelling Governmental interest and is the least restrictive means to further the articulated interest. See, Sable Communications of California v. Federal Communications Commission, 492 U.S. 115, 126, (1989) (Sable).

were permitted to air indecent broadcasts between the hours of 10 p.m. and 6 a.m.[13]

On June 30th, 1995, the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc, upheld the constitutionality of the Byrd amendment in Action for Children's Television, et al. v. FCC.[14] The court found, in a 7 to 4 opinion, that the "safe harbor" approach, also called "channeling", satisfied the two-part "strict scrutiny" test.[15]

The court found that the Government met the first prong of the test by establishing that the Government had a "compelling governmental interest" in protecting children from the harm caused by indecency. The court found two compelling governmental interests, and left open the possibility of a third.[16] First, the court found that "the Government has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves."[17] The court cited Ginsberg v. New York, 390 U.S. 629, 638, for the proposition that Government has a "fundamental interest in helping parents exercise their 'primary responsibility for [their] children's well-being' with 'laws designed to aid [in the] discharge of that responsibility'."[18] Second, the court found that "the Government's own interest in the well-being of minors provides an independent justification for the regulation of broadcast indecency." It quoted the Supreme Court again in New York v. Ferber, 458 U.S. 747, 756–57 (1982) for the proposition that

> * * * State's interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.[19]

The court found that the legislation met the second prong of the test because it uses the "least restrictive means" to accomplish that governmental interest. Here, the court noted that, in choosing the hours during which indecency would be banned, the Government must balance the interests of protecting children with the interests of adults: "The question, then, is what period will serve the compelling governmental interests without unduly infringing on the adult population's right to see and hear indecent material."[20]

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[13] Congress had already prohibited obscene and indecent broadcasts many years earlier. Section 1464 of Title 18 of the U.S. Code prohibits the broadcast of any obscene, indecent, or profane language by means of radio communication. This section was enacted as part of Section 326 of the Communications Act of 1934 and was moved into Title 18 in 1948.

[14] Slip Opinion No. 93–1092 (ACT IV).

[15] While the court upheld the "safe harbor" approach implemented by the Byrd amendment, it found that the different treatment of certain public broadcast stations and other stations was unjustified. The court thus directed the FCC to modify its rules to apply a consistent "safe harbor" of 6 a.m. to 10 p.m. for all broadcast stations.

[16] The court found it unnecessary to address the FCC's contention that there is also a compelling Governmental interest in protecting the home against intrusion by offensive broadcasts. ACT IV, at 13.

[17] ACT IV, at 13.

[18] ACT IV, at 13.

[19] ACT IV, at 13.

[20] ACT IV, at 21.

After reviewing the evidence compiled by the FCC, the court upheld the determination that a ban on indecent programming during the hours of 6:00 a.m. to 10:00 p.m. satisfied the balance and was the least restrictive means. The court noted that, to the extent that such a ban affected the rights of adults to hear such programming, "adults have alternative means of satisfying their interest in indecent material at other hours in ways that pose no risk to minors [such as renting videotapes, computer services, audio tapes, etc.]."[21] The court stated further that, "Although the restrictions burden the rights of many adults, it seems entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of the young."[22]

The reasoning of the court in ACT IV appears to apply equally to S. 470. As with indecency, the Government has a compelling interest in protecting the moral and psychological well-being of children against the harm of viewing television violence. Also as with indecency, restricting television violence to certain hours of the day balances the rights of adults to watch violent programming with the interests of protecting children. Adults have other ways of obtaining access to violent programming just as they have other ways of obtaining indecent materials. Thus, the decision upholding the "safe harbor" for indecency appears to provide strong support for finding a "safe harbor" for violence to be constitutional.

B. The strict scrutiny test

As noted above, several lines of exceptions and limitations to the First Amendment could provide a basis for finding the provisions of S. 470 constitutional. One of the most difficult of these tests, if not the most difficult, is the strict scrutiny test. The following discussion assesses the "safe harbor" approach under strict scrutiny, not because of the certainty that this is the test that will be applied, but because, if the "safe harbor" approach can pass the strict scrutiny test, it could certainly pass any lesser standard of review.

There is good reason to believe that S. 470 would pass the "strict scrutiny" test, and not just because of the similarity to the analysis under the ACT IV case. In some respects, the constitutionality of a "safe harbor" approach for violence could be *easier* to sustain than for indecency. As opposed to the indecency issue, Congress has developed a long and detailed record to justify the legislation. Congress has held hearings to explore various approaches to television violence in every decade since the 1950s. This Committee alone has held 18 days of hearings over the past three decades on this topic, including two hearings specifically on the "safe harbor" approach. The Committee has laid an extensive groundwork for considering the least restrictive means of protecting children from violence on television. By contrast, the Byrd amendment was adopted on the Senate floor without any Committee hearings. Furthermore, as Chief Judge Edwards of the D.C. Circuit has acknowledged twice, there is much stronger evidence that viewing violence

[21] ACT IV, at 23.
[22] Slip Opinion, at 25.

on television causes harm to children than any proposed harm caused by indecency.[23]

1. THE COMPELLING GOVERNMENTAL INTEREST

The Government has several compelling interests in protecting children from the harmful effects of viewing violence: an interest in protecting children from harm, an interest in protecting society in general, an interest in helping parents raise their children, and an interest in the privacy of the home. Each of these are discussed below.

A. HARM TO CHILDREN

Government has a compelling interest in protecting children from the harm caused by television violence. As several witnesses testified, there is little doubt that children's viewing of violence on television encourages them to engage in violent and anti-social behavior, either as children or later as adults. Somewhere between 200 and 3000 independent studies demonstrate a causal connection between viewing violence and violent behavior.[24] These studies have included "field" studies of the effect of television on persons in real life and laboratory studies. While the studies concluded in 1972 by the NIMH concluded that there was a causal relationship between viewing violence and behavior primarily among those children predisposed to violence, more recent research demonstrates that violent television affects almost all children. Dr. Eron stated in his testimony before the Committee as follows:

> One of the places violence is learned is on television. Over 35 years of laboratory and real-life studies provide evidence that televised violence is a cause of aggression among children, both contemporaneously, and over time. Television violence affects youngsters of all ages, both genders, all socio-economic levels, and all levels of intelligence. The effect is not limited to children who are already disposed to being aggressive, and it is not restricted to the United States.[25]

While it is perhaps axiomatic that children who become violent because of television suffer harm, it is worth noting that such children suffer harm in many ways. For example, they can become anti-social, distant from others, and unproductive members of society, especially if their actions arouse fear in other people. They can suffer from imprisonment or other forms of criminal punishment if their violence leads to illegal behavior.

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[23] "There is significant evidence suggesting a causal connection between viewing violence on television and antisocial violent behavior . . ." (emphasis in original) ACT IV, Edwards, C.J., dissenting, at 3. [Footnotes omitted].

[24] Among these are studies conducted by the American Medical Association, the American Psychological Association, the National Institute of Mental Health, the Center for Disease Control, and numerous studies by individual researchers. The Committee is aware of one observer who has called into question the conclusions of these studies. See Testimony of Jonathan Freedman, Professor of Psychology, Department of Psychology, University of Toronto, Ontario, Canada, Hearing on Television Violence before the Senate Committee on Commerce, Science, and Transportation, July 12, 1995.

[25] Oral Testimony of Dr. Leonard Eron on behalf of the American Psychological Association, Institute for Social of Michigan before the Senate Committee on Commerce, Science and Transportation, Communications Subcommittee, July 12, 1995. (Testimony of Dr. Eron).

Violent behavior may not be the only harm caused by viewing violent television. According to the American Psychological Association, viewing violence can cause fearfulness, desensitization, or an increased appetite for more violence.[26] In other words, as with "obscenity" and "indecency", the harm from television violence may result simply from viewing violent material, even if no violent behavior follows such viewing.

B. HARM TO SOCIETY

A related compelling Governmental interest is the need to protect society as a whole from the harmful results of television-induced violent behavior. A child who views excessive amounts of television violence is not the only person who suffers harm. As Dr. Eron testified, children who watch excessive amounts of television when they are young are more "prone to be convicted for more serious crimes by age 30; more aggressive while under the influence of alcohol; and, harsher in the punishment they administered to their own children."[27]

C. HELPING PARENTS SUPERVISE THEIR CHILDREN

In addition to the Governmental interests in protecting children and society from harm, the courts have also recognized a compelling governmental interest in helping parents supervise what their children watch on television. In Ginsberg, the Supreme Court upheld a New York statute making it illegal to sell obscene materials to children. The Court noted that it was proper for legislation to help parents exercise their "primary responsibility for [their] children's well-being" with laws designed to aid [in the] discharge of that responsibility.[28]

D. PRIVACY OF THE HOME

The Government's interest in protecting the privacy of the home from intrusion by violent programming may provide a fourth compelling Governmental interest. The Supreme Court has recognized that "in the privacy of the home * * * the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder".[29] The right to privacy in one's home was recently used to uphold legislation limiting persons from making automated telephone calls to residences and small businesses.[30] Just as subscribers to telephones do not give permission to telemarketers to place automated telephone calls, the ownership of a television does not give programmers permission to broadcast material that is an intrusion into the privacy of the home.

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[26] See, Testimony of Shirley Igo.

[27] Written Testimony of Dr. Eron, p. 2. Dr. Eron further warns that "* * * like secondary smoke effects, * * * don't think that just because you have protected your child from the effects of television violence that your child is not affected. You and your child might be the victims of violence perpetrated by someone who as a youngster, did learn the motivation for and the techniques of violence from television." Written Testimony of Dr. Eron.

[28] Ginsberg v. New York, 390 U.S. 629,639 (1968).

[29] FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978).

[30] See, Moser v. FCC, 46 F. 3d 970 (9th Cir. 1995), cert, denied by Supreme Court on June 26, 1995.

2. THE LEAST RESTRICTIVE MEANS

Opponents of the legislation argue that the "safe harbor" approach to television violence is not the least restrictive means of accomplishing the goals of reducing the exposure of children to television violence. Some in the broadcast industry, for instance, argue that the industry should be trusted to regulate itself to reduce the amount of violence. Parents should bear the primary responsibility for protecting their children, according to some observers. Others say that the warnings and advisories that many programmers now add to certain shows are a lesser restrictive means of protecting children. Finally, some believe that parental control technologies, such as the so-called "V-chip" technology, would protect children without imposing as much of a burden on the First Amendment rights of the television industry.

While these ideas may, indeed, be less restrictive than the "safe harbor" approach, they may not accomplish the goal of protecting children from violent television. In each case, the approaches mentioned above require that parents take an active role in supervising the television that their children watch or purchase certain technologies. Many children, however, do not have the benefit of parents willing and able to engage in these functions. According to William Abbott of the Foundation to Improve Television, "millions of children watch television unsupervised—¼ of our children have but a single parent (the latch-key kids)".[31]

The problem of unsupervised children is especially acute for residents of inner city neighborhoods. According to Gael Davis of the National Council of Negro Women, who herself was the victim of a random gunshot by an urban youth,

> Violence is the No. 1 cause of death in the African-American community. * * * [I]n south central [Los Angeles], * * * [t]he environment is permeated with violence. It is unsafe for children to walk to and from school. We have 80 percent latchkey children, where there will be no parent in the home during the afterschool hours when they are viewing the television. The television has truly become our electronic babysitter.[32]

Even when parents are available and concerned about the television programs that their children watch, they may not be able to monitor their children's television viewing habits at all times. According to a recent survey, 66% of homes have more than 3 or more television sets, and 54% of children have a TV set in their own bedrooms. Further, 55% of children usually watch television alone or with friends, but not with their families.[33]

The approaches discussed below may be helpful to children with parents or supervisors who can take advantage of them, but the parents who take advantage of these products and warnings are also likely to be the parents who are already taking responsibility

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[31] Testimony of William Abbott, President, Foundation to Improve Television, before the Committee on Commerce, Science and Transportation, Hearing on Television Violence, July 12, 1995.

[32] Testimony of Gael T. Davis, President, East Side Section, National Council of Negro Women, Hearing on S. 1383, the Children's Protection from Violent Programming Act of 1993, et al. before the Senate Committee on Commerce, Science and Transportation, October 20, 1993.

[33] Testimony of William Abbott.

to monitor the programs that their children watch.[34] Congress cannot forsake the needs of the millions of children whose parents will not be able to take an active role in supervising the television that they watch.

According to the "strict scrutiny" test, a regulation that limits freedom of speech based on the content must use "the least restrictive means to further the articulated interest."[35] As the following discussion explains, the "safe harbor" approach is the only approach that has a significant chance of furthering the compelling governmental interest in protecting all children, supervised and unsupervised, from the impact of television violence.

A. INDUSTRY SELF-REGULATION

As discussed earlier, the television industry has been told to improve its programming by Congress for over 40 years. The first Congressional hearings on television violence were held in 1952. Hearings were held in the Senate in 1954 and again in the 1960s, the 1970s, and 1980s. At each hearing, representatives of the television industry testified that they were committed to ensuring that their programming was safe and appropriate for children. In 1972, the Surgeon General called for Congressional action, but this call was ignored after the broadcast industry reached an agreement with the FCC to restrict violent programs and programs unsuitable for children during the "family hour".

There is substantial evidence, however, that, despite the promises of the television industry, the amount of violence on television is far greater than the amount of violence in society and continues to increase. According to one study, "[s]ince 1955, television characters have been murdered at a rate one thousand times higher than real-world victims. Indeed, television violence has far outstripped reality since the 1950s."[36] As noted earlier, the American Academy of Pediatrics recorded a threefold increase in the amount of violence on television during the 1980s. The most recent survey of television in one city found a 41% increase in two years.

As Shirley Igo noted in her testimony before the Committee on behalf of the National Parent-Teachers Association, the broadcast networks have drastically reduced the amount of educational programming for children:

> * * * it was found that in 1980, the three major networks combined were showing 11 hours of educational shows per week, but by 1990 such programming had diminished to less than two hours per week. Yet, there was more noneducational programming targeted at children than ever before. * * * It is clear to the National PTA and should be clear to members of this Committee that if our

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[34] According to Ed Donnerstein, "* * * it is going to be those parents who use the advisories, it is going to be those parents who might use the V-chip, it is going to be those parents who sit down with their child and discuss violence, who are probably not the parents and children we are most concerned about." Testimony of Ed Donnerstein, Professor, Department of Communications, University of California, Hearing on S. 1383, the Children's Protection from Violent Programming Act of 1993, et al., before the Senate Committee on Commerce, Science, and Transportation, October 20, 1993, p. 84.

[35] Sable, at 126.

[36] S. Robert Lichter, Linda S. Lichter and Stanley Rothman, Prime Time: How TV portrays American Culture (Regnery Publishing, Inc., Washington, D.C., 1994), p. 275.

> collective goal is to reduce violence on television, voluntary efforts by the industry will not get our nation to achieving that goal.[37]

The incentives of the television industry can be illustrated by a quote from a memo giving directions to the writers of the program "Man Against Crime" on CBS in 1953:

> It has been found that we retain audience interest best when our stories are concerned with murder. Therefore, although other crimes may be introduced, somebody must be murdered, preferably early, with the threat of more violence to come.[38]

The latest attempt to allow the industry to regulate itself came in 1990, when Senator Paul Simon authored legislation to give the television industry a three-year exemption from the antitrust laws to develop a common code to limit television violence. In December 1992, the four broadcast networks released a common code of conduct that many criticized for being weaker than the networks' own code of practices. In any case, the code appears to have had little effect on the amount of violence on television.

B. WARNING LABELS

Some observers argue that a requirement to put warnings or parental advisories before certain violent programs would be a less restrictive means of satisfying the Government's interest in protecting children. The Committee has received no evidence, however, that such warnings accomplish the purpose of protecting children.[39] Despite the industry's efforts to air such advisories on their own initiative over the past two years, the National Parent-Teachers Association and the Foundation to Improve Television support S. 470 as a more effective approach. Indeed, there is some reason to believe that advisories may increase the amount of violence on television, if the television industry believes that it has provided notice to parents to protect itself from criticism. Some observers believe that programmers may want a warning label to be placed on a program in order to attract viewers.[40]

As with the V-chip, discussed below, the warning labels are only likely to be effective if parents are willing and able to monitor the television programs that their children are watching. Without parental supervision, such warning labels may have the opposite effect of increasing the appetite of children for these shows. Further, it is difficult to believe that such warnings would be effective in the age of "channel surfing". Warnings that appear once at the very beginning of a program may not be seen by a viewer who does not see the beginning of a program.

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[37] Testimony of Shirley Igo, National PTA Vice-President for Legislation, before the Senate Committee on Commerce, Science, and Transportation, July 12, 1995.

[38] Quoted in Eric Barnouw, The Image Empire: A History of Broadcasting in the United States, Vol. III, p. 23.

[39] The Committee notes that it has received no evidence indicating that the warning labels on music records and compact discs has reduced the exposure of children to inappropriate lyrics.

[40] For example, Ms. Lindsay Wagner, a television actress, testified in 1993 that filmmakers sometimes lobby to get an "R" rating. "We now have a couple of generations that have been reared on violence for fun and many flock to the films with warnings." Testimony of Ms. Lindsay Wagner, Hearing on S. 1383, the Children's Protection from Violent Programming Act of 1993, before the Committee on Commerce Science and Transportation, p. 81.

C. PARENTAL CONTROL TECHNOLOGIES

Some observers believe that a variety of technologies that are now available to television consumers can assist parents in controlling the programs that their children watch. The Committee received testimony from a number of manufacturers during which they demonstrated how these technologies could be used. The television industry believes that there is no need for government action because parents can purchase technologies on the market that will allow them to screen out undesirable programs. In addition, the Committee also received testimony in favor of mandating that certain of these technologies be placed in every television set manufactured after a certain date (the so-called V-chip legislation).

For several reasons, it is not clear that any of these approaches will be effective.

First, each of these alternatives requires that parents spend money to purchase either a box, a service, a new television set, or software programs to conduct the screening. In other words, these alternatives place the burden on the parent, rather than on the industry that is generating the violent programming. Often, parents either cannot afford or choose not to spend the money to purchase these technologies. The developer of the Telecommander technology, for instance, received a patent for his television screening device in 1978, but has not been able to obtain capital to bring the product to market, presumably because of the uncertain demand for the product.

For the V-chip approach to be effective, parents would need to purchase new television sets with the chip before the parents could block out objectionable programs. According to the Electronics Industries Association, television sets are replaced every 8 to 12 years. For those families that have not yet replaced their televisions, and for those that retain old televisions even after they purchase a new television set, the V-chip may approach may not have much impact.

Second, there are significant questions about the ability of parents to program the technologies effectively. Any such technological approach must be easy enough for parents to use, but must be difficult enough to prevent the children from unblocking the program. In many households, however, the children often are more comfortable with the technologies than the parents.[41]

Third, once again, the use of these technologies depends upon the availability of an active and able parent to use the technologies. If no parent or supervisor is available, the child will not receive the protection from these technologies.

Fourth, the V-chip legislation already adopted by the Senate and House in the comprehensive telecommunications bills passed by each body (S. 652 and H.R. 1555) would not require programmers to encode each signal. Without such a requirement, however, it is uncertain whether programmers would rate the programs voluntarily and, if not, whether the legislation would be effective.

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[41] It is worth noting that one of the witnesses at the July 12 hearing before the Committee had difficulty operating the technology that his company had developed. See, Oral Testimony of Mr. Wayne C. Luplow, Vice President, Zenith Electronics Corporation, Hearing on Television Violence before the Committee on Commerce, Science and Transportation, July 12, 1995.

Finally, if legislation required broadcasters to encode their signals, it might not be the least restrictive means. The burden of rating every single program and including an encoded signal could be extensive. The burden would be especially onerous if the coding requirement were imposed on all programs, new and old.

The "safe harbor" approach, by comparison, would not require the programmers to rate each and every program, but would simply rely upon a complaint process at the FCC to determine whether, after a program was televised, the program violated the FCC's definition of violence.

In summary, none of the alternatives considered by the Committee would appear to be effective in protecting both supervised and unsupervised children from the harm caused by television violence. They all depend upon the active participation of parents or adults. Even when such adults are willing to implement screening devices, it is not certain that they will purchase the products required or that they will know how to program the television to block out the programs. Similarly, the V-chip requirement may be helpful to parents who purchase television sets with the technology and who know how to program the set if the television industry encodes their programs with the appropriate electronic signal. Such a requirement is likely to be more burdensome than the "safe harbor" approach, however. Thus, the "safe harbor" approach is likely to meet "least restrictive means" prong of the "strict scrutiny" test.

C. Additional issues

1. Definition of violence

Some have raised questions about the definition of violence in S. 470. Some have criticized the legislation for failing to include a definition; others state that it is inherently impossible to craft a definition that would not be "overbroad" or "vague" in violation of the constitutional requirements set down by the Supreme Court.

S. 470 adopts the same approach toward "violent video programming" as Congress has previously adopted for "indecency". Section 1464 of Title 18 prohibits the broadcast of indecency but does not contain a definition of the term. In 1975, the FCC adopted a definition of indecency that the courts have found to be proper. While it may be difficult to craft a definition that reflects the context of violence, that is not overbroad, that is not vague, and that is consistent with the research of harm caused to children, these are exactly the tasks that the FCC was created to perform. The FCC can hold its own hearings, seek comment from the industry and the public, review the research in detail in order to come up with a definition.

Some observers cite the case of Video Software Dealers Association v. Webster to support the position that legislation to restrict violent video is unconstitutional. That case, however, concerned a statute that neither contained a definition of violence nor delegated the definition to a regulatory agency. S. 470, by contrast, does not take effect until the FCC issues a definition of violence. In Davis-Kidd Books v. McWherter, the court overturned a statute that contained a definition of violence that was overly vague. While this case demonstrates the difficulty of defining violence, it does not stand for the proposition that violence is incapable of being defined.

If the FCC fails to come up with a definition of violent video programming that satisfies constitutional scrutiny, the legislation authorizes the FCC to try again until it does.

2. Applicability to cable television and other broadcast technologies

Other observers question the constitutionality of restricting violence on cable television and other distribution media in addition to broadcasting. These commenters believe that the courts have never extended controls on content beyond television broadcasters. The note that Red Lion, Pacifica, and the line of ACT cases pertained only to broadcasting, not to cable or any other form of media.

There are several responses to this argument. First, the "strict scrutiny" test applies to any content regulation, not just those imposed on broadcast stations. The Supreme Court has, for instance, applied the "strict scrutiny" test to telephone communications[42] and to newspapers.[43] These cases indicate that a restriction on violent video programming could, potentially, be imposed on any media if it satisfies the "strict scrutiny" test.[44]

Second, the characteristics of non-premium cable service and other video distribution media are virtually identical to broadcasting. Admittedly, the Supreme Court has indicated that broadcasting has received more limited First Amendment protection than other media. Even the ACT IV decision states that "radio and television broadcasts may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment."[45]

The rationale given by the courts for subjecting broadcasting to a more restrictive treatment, however, applies equally to non-premium cable service and other multi-channel video programmers. The ACT IV court noted that the Supreme Court has identified two reasons for treating broadcasting differently:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, * * * Second, broadcasting is uniquely accessible to children. * * * The ease with which children may obtain access to broadcast material, * * * amply justifies special treatment of indecent broadcasting.[46]

The ACT IV court further noted that "broadcast audiences have no choice but to "subscribe" to the entire output of traditional broadcasters."[47]

Just as with broadcast television, non-premium cable service has grown to have a uniquely pervasive presence in the lives of all Americans and is uniquely accessible to children. Over 60% of con-

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[42] Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).
[43] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).
[44] The court in ACT IV states, "[W]e apply strict scrutiny to regulations of this kind [concerning indecency] regardless of the medium affected by them * * *". ACT IV, at 12.
[45] ACT IV, at 12.
[46] Pacifica, at 748–750.
[47] ACT IV, at 12.

sumers now receive some form of cable service. Because of the "must carry" rules, almost all of these subscribers now receive their broadcast signals through their cable systems. From the perspective of the viewer, and especially children, there is little if any distinction between the broadcast programs that come in over the cable system and the cable-only programs. Indeed, cable television service has become so important a service to the average American that Congress has required the rates for cable television to be regulated.[48] Even the ACT VI court hints at the similarity between cable television and broadcasting when it states that cable "is not immune to the concerns we address today [concerning indecency]."[49] In fact, Chief Judge Edwards, writing in dissent, criticizes the majority opinion for upholding the restriction on indecency even though it applies only to broadcasting and not to cable.[50]

S. 470, however, exempts premium or pay-per-view channels in recognition of the fact that parents have the choice to subscribe to these channels on an individual basis. This distinction between premium channels and pay-per-view programs, on the one hand, and basic or expanded basic packages of cable programs, on the other, demonstrates the Committee's attempt to balance the rights of children and the legitimate rights of parents to watch the programs that they want to watch. In this way, the legislation avoids unnecessarily interfering with parents' First Amendment rights in order to meet the least restrictive means test.

LEGISLATIVE HISTORY

In October 1993, the Senate Commerce Committee held a hearing on television violence to consider a variety of legislative proposals. Attorney General Janet Reno testified that the legislation currently pending before the Committee, including S. 1383, the Hollings-Inouye legislation establishing a "safe harbor" for violent programming, would be constitutional. The broadcast networks and other industry representatives argued that the amount of violent programming was less than in previous years. The industry also testified that the industry should be given more time to implement its warning labels before legislation should be considered.

S. 470 was introduced on February 23, 1995, by Senator Hollings and cosponsored by Senators Inouye and Thurmond. On July 11, 1995, the Committee held its second hearing on television violence to consider pending measures, including S. 470. S. 470 (104th Congress) is identical to S. 1383 (103rd Congress). In open executive session on August 10, 1995, the Committee ordered reported S. 470 without amendment, by a rollcall vote of 16 yeas and 1 nay, with two Senators not voting.

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[48] See, the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 106 Stat. 1460 (The 1992 Cable Act).

[49] ACT IV, at 11.

[50] "I find it incomprehensible that the majority can * * * be blind to the utterly irrational distinction that Congress has created between broadcast and cable operators." ACT IV, C.J. dissenting, at 4.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 27, 1995.

Hon. LARRY PRESSLER,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 470, the Children's Protection from Violent Programming Act of 1995, as ordered reported by the Senate Committee on Commerce, Science, and Transportation on August 10, 1995. CBO estimates that implementing S. 470 would cost the federal government about $3 million over the next five years, assuming appropriations of the necessary amounts. Because enactment of S. 470 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill. S. 470 also would not affect the budgets of state or local governments.

S. 470 would prohibit the distribution of violent programming on broadcast and cable television during the hours of the day when children are likely to comprise a substantial portion of the viewing audience. The bill would instruct the Federal Communications Commission (FCC) to conduct a rulemaking in order to define violent programming and determine the hours of the day which violent programming would be prohibited. It would require the FCC to repeal the license of any person who repeatedly violates the regulations and would instruct the FCC to consider compliance with the regulations in its review of an application for renewal of a license. The enforcement provisions would apply to broadcast television only since cable television operators are not licensed.

Based on information from the FCC, CBO estimates that promulgating the rules required by the bill would result in increased costs to the federal government of approximately $300,000 in 1996, primarily for personnel costs, assuming appropriation of the necessary amounts. CBO expects that the FCC would receive a number of complaints regarding violations of the commission's rules concerning the distribution of violent programming. In addition, the FCC would incur a small additional cost to review applications for renewal of licenses. We estimate that the costs to the FCC to both monitor the complaints and review compliance with the regulations would cost about $800,000 in fiscal year 1997 and slightly less in subsequent years, assuming appropriation of the necessary amounts.

If you wish any further details on this estimate, we will be pleased to provide them. The CBO staff contact is Rachel W. Forward.

Sincerely,

JUNE E. O'NEILL, *Director.*

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

The primary impact of this legislation will be on the television networks, broadcast stations, and cable programmers insofar as they must determine when to air certain kinds of programming. The economic impact on the broadcasters and cable programmers is likely to be negligible at worst and could be positive. The networks and broadcast stations already have standards and practices departments that review all programs for their content. The legislation would simply require these reviewers to add an analysis of the violent content of programs to the analyses that they currently conduct. To the extent that broadcast and cable programs contain less violence, they are more likely to attract additional viewers, especially younger children and parents, which will enable the broadcasters and cable programmers to sell more advertising time, thus increasing the potential revenues of the industry.

There will be no impact on personal privacy as a result of this legislation.

The paperwork resulting from this legislation will be primarily due to the initial proceeding to define violent programming and determine the hours of the day during which violent programming would be prohibited.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

This section states the short title of the bill as the Children's Protection from Violent Programming Act of 1995.

SECTION 2. FINDINGS

Section 2 of the bill states Congressional findings.

SECTION 3. UNLAWFUL DISTRIBUTION OF VIOLENT PROGRAMMING

Section 3 adds a new section 714 to the Communications Act of 1934 that makes it unlawful for any person to—

(1) distribute to the public any violent video programming during hours when children are reasonably likely to comprise a substantial portion of the audience; or

(2) knowingly produce or provide material for such distribution.

To implement this prohibition, new section 714(b) requires that the FCC conduct a rulemaking proceeding, to conclude with the issuance of final regulations not later than 9 months after enactment. As part of the proceeding, the FCC is required to exempt premium and pay-per-view cable programming and is authorized to exempt programming (including news programs, documentaries, educational programs, and sporting events) whose distribution does not conflict with the objective of protecting children from the negative influences of violent programming. Further, the FCC is required to define the terms ''hours when children are reasonably

likely to comprise a substantial portion of the audience" and "violent video programming."

New section 714(c) provides for the FCC, after notice and opportunity for hearing, to immediately repeal any license issued to a person who repeatedly violates new section 714 or its implementing regulations.

New section 714(d) requires that the FCC, in reviewing an application to renew a license issued under the Communications Act of 1934, consider whether the licensee has complied with new section 714 and its implementing regulations.

New section 714(e) defines the term "distribute."

SECTION 4. EFFECTIVE DATE

Section 4 states that the prohibition contained in new section 714 and its implementing regulations shall be effective one year after the enactment of the bill.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 470:

At the close of debate on S. 470, the Chairman announced a rollcall vote on the bill. On a rollcall vote of 16 yeas and 1 nay as follows, the bill was ordered reported:

YEAS—16	NAYS—1
Mr. Pressler	Mr. McCain [1]
Mr. Stevens [1]	
Mr. Gorton	
Mr. Lott	
Mrs. Hutchison	
Ms. Snowe	
Mr. Ashcroft	
Mr. Hollings	
Mr. Inouye [1]	
Mr. Ford	
Mr. Exon [1]	
Mr. Rockefeller	
Mr. Kerry [1]	
Mr. Breaux	
Mr. Bryan	
Mr. Dorgan	
Mr. Pressler	

[1] By proxy

ADDITIONAL VIEWS OF SENATOR PRESSLER

S. 470 would ban the broadcast of "violent video programming during hours when children are reasonably likely to comprise a substantial portion of the audience." While this proposal is certainly well-intentioned, it presents many constitutional and policy issues of serious concern.

I never have, do not, and will never condone the gratuitous depiction of violence on television. But I feel equally strongly that decisions about which television programs a child should watch should be made by parents, not government. To the extent there is a demand for technology to assist parents in implementing viewing decisions, the market will respond to fill that need. Indeed, this already is happening.

As we saw demonstrated at the Committee's hearing on this topic, the free marketplace is spawning technology—not dependent on government intervention—that empowers parents to control what their children see on television. Before we do violence to the First Amendment, Congress should let the marketplace, responding to parents demands, develop solutions to the television violence issue.

CONSTITUTIONAL FLAWS

The Supreme Court has held repeatedly that statutes must define the speech subject to regulation with precision and encompass no more speech than is necessary to advance compelling governmental interests. S. 470 does not appear to satisfy this clear constitutional requirement. Nor does it seem this constitutional flaw be cured by adding a definition. Even if S. 470 were amended to add a definition of "violent video programming," it would remain subject to attack unconstitutionally vague and over broad.

Under Supreme Court precedent, violent expression is subject to government regulation only in the most limited circumstances—where the speech is intended and likely to incite immediate violence. No record supports the premise that exposure to any violent video programming causes immediate undesirable imitative behavior by typical viewers.

As the Seventh Circuit recognized in the 1985 Hudnut case, "violence on television * * * is protected as speech, however insidious. Any other answer leaves government in control of * * * the institutions of culture, the great censor and director of which thoughts are good for us." This decision was affirmed by memorandum by the Supreme Court. American Booksellers Ass'n v. Hudnut, 771 F. 2d 323, 330 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986).

Another constitutional question is raised by S. 470's attempt to distinguish between "good" and "bad" violence by authorizing the Federal Communications Commission (FCC) to exempt news programs, documentaries, educational programs and sporting events.

The Supreme Court has not found the First Amendment to distinguish between movies, sitcoms and talk shows on the one hand, and news programs, documentaries and sporting events on the other—all receive the same constitutional protection. For half a century, the Court has noted that the "line between the informing and the entertaining is too elusive" to constitute a constitutionally cognizable distinction. By singling out certain categories of programming for differential treatment, the bill could be found to promote a form of content discrimination that violates the First Amendment. In addition to the overbreadth and vagueness problems of the definition of violent video programming, the outright ban itself on such programming, during hours in which the FCC determines "children are reasonably likely to comprise a substantial majority of the audience," also could be found to be over broad. In an attempt to protect children from access to violent programming, S. 470 would deny all Americans, young and old alike, from viewing certain programming during prime time hours—the most popular viewing hours. This ban would needlessly affect the two-thirds of American households with no children. To borrow a phrase used by the Supreme Court in an overbreadth case, this could be viewed by the Court as "burning down the house to roast a pig."

I am also concerned about the chilling effect a "safe harbor" will have on broadcasters, since the First Amendment protects against inhibition and subtle interference with speech rights. Broadcasters who violate the terms of this legislation face draconian penalties. S. 470 empowers the FCC to repeal the station license of any person who repeatedly violates the Act. Furthermore, the FCC is directed to examine a station station's compliance with the Act when considering a license renewal application.

Serious concerns are raised by the fact that a violator will not know of its transgressions until *after* broadcasts have occurred, when it is then ruled that certain programming shown during restricted hours was violent. With the prospect of literally being driven off the air, broadcasters will be much more likely to steer well on the safe side of airing only programs they can be assured will not later be deemed violent. Serious dramas dealing with real issues, as well as some slapstick comedy, could be banished to the graveyard shift along with gratuitous violent fare. S. 470 could chill, if not freeze, broadcasters' First Amendment rights to make programming decisions.

PARENTAL CONTROL TECHNOLOGY: A LESS RESTRICTIVE ALTERNATIVE

S. 470 asserts that "(r)estricting the hours when violent video programming is shown is the least restrictive and most narrowly tailored means to achieve that compelling governmental interest. While the bill thus acknowledges the proper First Amendment standard, there is serious question as to whether it satisfies that standard.

I do not quarrel with S. 470's goal of "limiting the negative influences of violent video programming on children." I simply question the premise that the imposition of government regulation is the *least* restrictive means to further that interest.

Less speech-restrictive alternatives to S. 470's "safe harbor" hours seem quite viable. As exhibited during the hearing on this legislation, there is strong evidence the marketplace is responding with concrete solutions to empower parents with technology that is not dependent upon governmental intervention to limit their children's exposure to programming they deem harmful. These devices empower parents to control *what* their children watch, *how much* they watch, and *when* they watch it.

According to the Electronic Industries Association, there are some 200 models of televisions, *available today*, that are equipped with on-screen programming devices to block channels for a specified amount of time, with security assured by personal identification numbers known only to the parents. Other manufacturers have developed set-top devices that work with existing televisions to provide similar parental control features. (Of course, parents who subscribe to cable have for years been able to block channels at their cable box, either electronically or mechanically with a key.)

I was impressed with testimony from innovative manufacturers who soon will bring to the market even more sophisticated technology, and I also am very encouraged by the recent commitment of the four major networks to set up a $2 million fund to spur further development of parental control technology.

The plethora of information available about the content of television programming allows parents to utilize this technology to easily and effectively control what their children watch at home. Since 1993, broadcasters have increased the use of advisories for programming with violent content. These advisories, which are also provided to newspapers and television guides, enable parents to make viewing decisions for their children based on their own notions of child rearing, either by shutting off the TV or programming parental control devices. Moreover, a great number of independent sources provide information allowing parents to make choices appropriate for their family. For example, ratings, advice and reviews of programming are available from the American Family Association, Focus on the Family, Parents' Choice, KIDSNET, the Media Research Center and TV Guide. This variety of sources of information seems clearly preferable to an FCC-defined definition of "violent" programming, and certainly is a less restrictive alternative to a government-mandated ban on violent programming.

Additionally, the broadcast and cable industries have commissioned independent studies of their programming, the findings of which should be available beginning this fall. I also note the television industry has sponsored community-based, anti-violence programming, which can help children unlearn "violent" behavior.

Clearly, these ongoing and accelerating efforts—by manufacturers, broadcasters, independent groups and parents alike—have thrived in an environment devoid of any governmental mandate. Indeed, such interference may inhibit both the development of improved technology and the dissemination of more information about the content of programming from independent sources from which parents themselves can select. These efforts offer a less restrictive alternative to a broadcast ban. They address the TV violence issue head-on without fear of transgressing the First Amendment of the U.S. Constitution.

A "SAFE HARBOR" WILL BE OF LIMITED VALUE

I also have questions about the effectiveness of S. 470's broadcast ban in reducing children's exposure to programming their parents deem harmful.

First, despite this legislation, children in the majority of households that subscribe to cable television will have no problem accessing violent programming during the hours in which over-the-air broadcasters are banned from airing such programming. All children need to do is turn to a premium cable channel or order pay-per-view programming.

Second, constitutional issues aside, I foresee many problems resulting from assigning to the FCC the responsibility to define "violent video programming." If experts, politicians and parents cannot agree on a definition of "violent" programming, why should we assume the FCC will succeed? Would a "Tweety Bird" cartoon be deemed "violent"? What about slapstick humor of the "Three Stooges"? What about a western or a war movie, where killing undoubtedly will occur?

Third, if history is any guide, the FCC's record of arbitrary and uneven enforcement of its "indecency" authority indicates the FCC would be incapable of supplying an ascertainable standard for the even more difficult to define concept of "violent video programming." This uncertainty will undermine further the constitutionality of S. 470 and embroil the FCC in litigation.

This Committee has witnessed firsthand the difficulty of deciding what constitutes violent programming, and what does not. In 1993 we viewed an episode of the television program "Love and War." While some of us viewed it as a parody of violence and pure slapstick, it was shown for the purpose of providing a snapshot example of current violent programming. Ironically, at this year's hearing on S. 470, the Committee heard testimony that listed "Love and War" as among the *least* violent programs in a Concordia College study that took a snapshot look at a week's worth of television programming. Further illustrating the clumsy manner in which programs are labeled, that same study placed the Helen Keller movie, "The Miracle Worker" on par with MTV's "Beavis and Butthead."

The heart of the matter is that parents, not the government are best equipped to decide what their children may watch and when they may watch it. Would most parents share the legislation's assumption that heavyweight boxing is acceptable programming for their children, but a movie such as "Schindler's List" is not? S. 470 actually interferes with parenting by removing viewing options from parents, who rightfully should be the ones to decide what their children should watch.

CONCLUSION

S. 470 needlessly threatens the First Amendment, and involves government in an area that should be reserved for parents. The marketplace—properly accountable to parents who are assuming more responsibility for monitoring the programming their children watch—is developing solutions that work. Congress should continue to urge the broadcast and cable industries to act responsibly with respect to program selection, but we should leave to parents

the responsibility for determining what is appropriate family viewing.

MINORITY VIEWS OF SENATORS MCCAIN AND PACKWOOD

Violence on television is a problem. We commend broadcasters for voluntarily airing parental advisories before and during violent programs and for voluntarily reducing the amount of violent programming they carry. Nevertheless, it is not yet clear whether these voluntary efforts are having a substantial impact. It is therefore appropriate for the Committee to ask: "What is the most appropriate action for Congress to take, and what will result in the most success?" When asked both questions, S. 470 unfortunately fails.

S. 470 is well-intentioned, but we fear it will create more problems than it will solve. Congress has resisted the temptation to legislate in this area in the past because it is inherently difficult to do so in a manner that does not raise legitimate issues of censorship, vagueness and over-breaaaadth, and that won't have a chilling effect on free expression.

S. 470 would empower politically-appointed bureaucrats at the Federal Communications Commission to decide for the rest of us when a program is "violent." And it would prohibit the broadcast of violent programs at any time of day or night when the FCC determines that children are reasonably likely to comprise a substantial portion of the viewing audience. The legislation assumes that unelected FCC bureaucrats know best. The fact is that under this bill, the FCC would become the almighty arbiter of what is or is not violent programming. This is a dangerous scheme, and it raises precisely the type of danger the First Amendment was designed to prevent.

The First Amendment requires that restrictions on free speech must be the least restrictive and the most narrowly tailored means to achieve a compelling governmental objective. S. 470 clearly fails the first prong of this test in light of emerging technology which will allow parents to block objectionable programs.

The legislation contains other constitutional problems as well.

First, the courts have repeatedly warned Congress that it must define the speech it wants to regulate with precision in order to encompass no more speech than is necessary. It won't be easy to define the term "violent video programming," and S. 470 doesn't even attempt to do so. For example, some people would consider Star Wars violent, while others would consider Star Wars family entertainment. The bill leaves it to the FCC to define what the term "violent video programming" means. Given the FCC's difficulty in crafting a consistent and workable definition of "indecency," we seriously question whether it can define the term "violent" and wonder how much litigation their effort will spawn.

Second, the bill authorizes the FCC to single out certain categories of programming for differential treatment. The FCC would be allowed to exempt news programs, documentaries, educational

programming, and sporting events. The first Amendment clearly forbids discrimination on the basis of content, and we question whether this provision of the bill will survive judicial scrutiny.

Further, what may be an educational program or a documentary to one individual may be entertainment to another. The bill offers no clue into which category films such as Gone With the Wind and Schindler's List would fall. We do not believe that politically-appointed bureaucrats should decide what is entertainment and thus cannot be shown on TV and what is educational and thus would be legal to show. Passage of this bill would produce an endless stream of questions and court cases asking what is a news program, what is a documentary, and what is educational programming and what qualifies as legitimate sport.

We suspect this bill would be overturned by the courts and all of our efforts will have been for nothing. We need to reconsider this measure and look instead at other approaches which will reduce television violence and not violate the First Amendment.

One such approach favored by many would be for broadcasters to educate parents as to what is on television and for television manufacturers to give parents more of an ability to stop their children from watching the programming that they, as parents, deem to be violent. This approach would empower parents by giving them the knowledge they need and an enhanced ability to act on that knowledge.

Due to our concerns about constitutionality and our fear that a politically-motivated FCC staff will be deciding what airs on television and what does not, we cannot support this measure.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changed in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

SEC. 714. UNLAWFUL DISTRIBUTION OF VIOLENT PROGRAMMING.

(a) UNLAWFUL DISTRIBUTION.—It shall be unlawful for any person to—

(1) distribute to the public any violent video programming during hours when children are reasonably likely to comprise a substantial portion of the audience; or

(2) knowingly produce or provide material for such distribution.

(b) RULEMAKING PROCEEDING.—The Commission shall conduct a rulemaking proceeding to implement the provisions of this section and shall promulgate final regulations pursuant to that proceeding not later than 9 months after the date of enactment of the Children's Protection from Violent Programming Act of 1995. As part of that proceeding, the Commission—

(1) may exempt from the prohibition under subsection (a) programming (including news programs, documentaries, educational programs, and sporting events) whose distribution does not conflict with the objective of protecting children from the negative influences of violent video programming, as that objective is reflected in the findings in section 2 of the Children's Protection from Violent Programming Act of 1995;

(2) shall exempt premium and pay-per-view cable programming; and

(3) shall define the term "hours when children are reasonably likely to comprise a substantial portion of the audience" and the term "violent video programming".

(c) REPEAT VIOLATIONS.—If a person repeatedly violates this section or any regulation promulgated under this section, the Commission shall, after notice and opportunity for hearing, immediately repeal any license issued to that person under this Act.

(d) CONSIDERATION OF VIOLATIONS IN LICENSE RENEWALS.—The Commission shall consider, among the elements in its review of an application for renewal of a license under this Act, whether the licensee has complied with this section and the regulations promulgated under this section.

(e) DEFINITION.—As used in this section, the term "distribute" means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire, microwave, or satellite.

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